In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1588

WILLIAM T. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are present and former employees of the government-owned Alaska Railroad.[1] As such, they are considered government employees for purposes of the

---

[1]Pursuant to the provisions of 43 U.S.C. 975, authorizing him to construct and operate a railroad in Alaska, the President, by Executive Order No. 11107 (April 25, 1963), 28 Fed. Reg. 4225, authorized the Secretary of the Interior to operate the railroad. This authority of the Secretary of the Interior was subsequently transferred to the Secretary of Transportation. 49 U.S.C. 1655(i).

The Secretary of Transportation has exercised his authority to "fix and adjust" the rate of compensation for Railroad employees by authorizing the General Manager of the Railroad to engage in collective bargaining with the railroad unions. The parties have in turn agreed "that the wage rates payable to employees of the Northern Pacific Railway [with suitable cost-of-living differential] constitute a fair and equitable pattern to be used for determining wage rates for operating employees of the Railroad." Basic Labor Agreement, par. 9.

federal overtime statute, 5 U.S.C. 5544. *Samples* v. *United States,* 135 Ct. Cl. 548. The issue in this case is whether the railroad properly computed the amount of overtime pay to which petitioners are entitled pursuant to 5 U.S.C. 5544.

1. The Alaska Railroad pay system is, according to the Court of Claims, "possibly the most complex mode of calculating compensation for personal services that the mind of man has ever devised" (Pet. App. 2). The pay system is established under a collective bargaining agreement between petitioners' union and the railroad. The agreement adopts a dual system of compensation which is commonly used in the railroad industry. Under the dual system 12.5 miles per hour is, for historical reasons, assumed to be the standard speed of a train. Each employee's pay rate is fixed by the agreement and is stated as a rate per mile (the "mileage" rate). The hourly rate is determined by multiplying the "mileage" rate by 12.5. Under this system 100 miles of travel produces pay equivalent to eight hours pay. If more than eight hours are required for 100 miles travel, the hourly rate will produce greater compensation and that rate is used. If, on the other hand, a train travels more than 100 miles in eight hours, the "mileage" rate times actual mileage traveled will produce greater compensation and that formula is used.

In addition to the dual system, the agreement also provides for certain payments known as "arbitraries". These payments are either for work in special situations where no work was in fact performed, or for work done within hours of work otherwise paid for by the basic pay rate. For example, a brakeman is accorded 15 miles credit for uncoupling an airhose even if the work required only one minute to perform (Pet. App. 3).

The relationship of the Alaska railroad pay system to the federal overtime statute was previously the subject of litigation in the Court of Claims in *Samples, supra.* In that case it was held that railroad employees were entitled to overtime under the Act whenever actual hours worked exceeded 40 per week. The court also held that the basic rate for purposes of computing overtime was the "mileage" rate (*i.e.,* the rate fixed by the agreement) times 12.5. Finally, the court determined that in computing overtime, "arbitraries" were to be disregarded. As a result of the *Samples* decision railroad employees who worked more than 40 hours per week would receive basic pay computed under the dual system on either the hourly or actual mileage formula, federal overtime computed at the rate of 1.5 times the mileage rate times 12.5, plus "arbitraries".

In the wake of the *Samples* decision the collective bargaining agreement was amended to provide that employees working in excess of 40 hours per week would receive the greater of compensation computed under the federal overtime statute or under the dual system including arbitraries. If, however, an employee receives compensation under the federal overtime statute, no "arbitraries" are paid (Pet. App. 4).

Petitioners' two primary claims relate to the dual system and arbitraries. First, petitioners contend that for purposes of the federal overtime statute basic pay must be fixed under the actual mileage formula rather than the hourly rate fixed by the agreement (*i.e.,* the mileage rate times 12.5). Second, petitioners contend that if compensation is paid under the federal overtime statute, the railroad cannot refuse to pay arbitraries.

Petitioners also press two other claims relating to so-called "Extra Board" employees and to the cumulation of time worked in excess of eight hours per day and 40 hours per week. The "Extra Board" claim is related to an arbitrary known as the biweekly guarantee which is described in detail in the Court of Claims' opinion (Pet. App. 9-10). Petitioners' cumulation claim is also discussed in detail in the Court of Claims' opinion (Pet. App. 11-12). The thrust of this claim is illustrated by the following example: if an employee worked ten hours on Monday and eight hours the remaining four days of the week, petitioners contend that he would be entitled to four hours overtime—two hours fo work in excess of eight hours on Monday and two hours for work in excess of 40 hours for the week. The United States, on the other hand, contended, and the Court of Claims held, that only two hours of overtime would result.

On cross motions for summary judgment, the Court of Claims granted the government's motion, holding that petitioners' basic hourly rate of pay (upon which the amount of overtime compensation is based) is their mileage rate multiplied by 12.5, a calculation previously approved in *Samples v. United States, supra;* that the agreement of the railroad and petitioners' union not to pay arbitraries when paying statutory overtime did not contravene 5 U.S.C. 5544; that Extra Board employees were not "on call" within the meaning of the federal overtime statute; and that the federal overtime statute grants employees overtime benefits for work in excess of 8 hours a day, or in excesss of 40 hours a week, but that the two cannot be cumulated.

2. The decision of the Court of Claims is correct, is consistent with its earlier decision in *Samples* v. *United States, supra,* and correctly interprets 5

U.S.C. 5544. No issue warranting review by this Court is presented.

a. Petitioners contend that the method for calculating overtime violates 5 U.S.C. 5544 in that the Railroad continues to utilize the standard of one hour equals 12.5 miles as the basis for calculating the basic hourly rate. It is petitioners' position that the Railroad should calculate the basic hourly rate by dividing the actual miles travelled in any one time period by the actual hours in that period, even though this method will obviously yield a different basic rate for every period.[2] There is nothing in 5 U.S.C. 5544, however, which requires the Railroad to utilize the formula advanced by petitioners in place of a formula agreed upon in *bona fide* collective bargaining negotiations. Moreover, the *Samples* court indicated that the basic hourly rate for overtime calculations of 12.5 multiplied by the mileage rate, did not contravene the federal overtime statute. *Samples* v. *United States,* 135 Ct. Cl. at 600.

---

[2]The difference between the method actually utilized and the method petitioners contend should be utilized is illustrated by the following example:

Assume a rate per mile of $.3720. The Railroad obtains the basic rate by multiplying this figure by 12.5 to obtain an hourly rate of $4.65. To the Railroad, this represents the "basic rate" for purpose of the statute and the overtime rate would be equivalent to one and one-half times $4.65.

This method should be compared with the method petitioners contend should be utilized. Assume an employee who works on a train which travels 200 miles in eight hours. At the same rate per mile utilized above, the employee would earn $74.40. If this figure is divided by 8, the actual hours consumed in the trip, the hourly rate would amount to $9.30 for each hour worked (Pet. App. 2-3).

Petitioners' reliance (Pet. 13) upon cases arising under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, is misplaced. The principles regarding overtime compensation in that Act are expressly made inapplicable to railroad employees such as petitioners. 29 U.S.C. 213(b). Moreover, those principles were not violated here.The Fair Labor Standards Act does not prohibit an employer and its employees from establishing the regular wage rate by contract. *Walling* v. *Belo Corp., 316 U.S. 24.* The only issue presented in the cases petitioners cite was whether the contract rate was designed to circumvent the Act. See, *e.g., Walling* v. *Helmerich & Payne,* 323 U.S. 37, 42; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419. Here, the Court of Claims correctly held that the contract at issue was not a subterfuge to evade the requirements of the statute (Pet. App. 6).[3]

b. With respect to the non-payment of arbitraries when the compensation due computed pursuant to the statute exceeds the compensation due pursuant to the dual system, the Court of Claims correctly held that arbitraries are not required by the statute.

The purpose of the statute is to ensure payment at the basic rate for non-overtime hours actually worked and at one-and-a-half times the basic rate for overtime hours actually worked. In *Samples, supra,* the Court of Claims held that arbitraries are not related to this statutory policy since they do not, in major part, relate to hours worked. Petitioners admit that, at the very least, arbitraries "usually" do not represent payment for hours actually worked (Pet. 25).

---

[3]As the Court of Claims found, the hourly rate at issue actually controls the earnings for a large number of the hours worked (Pet. App. 6).

c. The Court of Claims properly held that the Railroad may count as weekly overtime hours the total number of hours in excess of eight worked each day, or the number of hours in excess of forty worked in that same week, whichever is greater, but not both.

Petitioners' reliance on the Contract Work Standards Act, 40 U.S.C. 327 *et seq.* (referred to in the petition as the "Work Hours Act of 1962"), is misplaced. Indeed, that Act supports the decision of the Court of Claims. The terms of that Act—which provide for over-time compensation for daily hours in excess of eight or weekly hours in excess of forty "as the case may be"—show that Congress intended overtime compensation only for the greater of the total number of daily hours in excess of eight or the number of weekly hours in excess of 40, the rule followed by the Railroad here. See H. Rep. No. 1553, 87th Cong., 2d Sess., pp. 5-6.[4]

Moreover, when the Contract Work Standards Act was passed, Congress was familiar with the settled practice of the Department of Labor in administering the Walsh-Healy Act, 41 U.S.C. 35(c). The regulation cited by petitioners, 41 C.F.R. §50-201.103(c),[5] (Pet. 30), was promulgated in its present form almost from the very

---

[4]The purpose of the Contract Work Standards Act was to establish the 40 hour week as the basic work week for work performed under contract with the federal government. See S. Rep. No. 1722, 87th Cong., 2d Sess., p. 2. As noted above, the Act requires overtime compensation for daily hours in excess of 8 hours or weekly hours in excess of 40 hours "as the case may be". Section 201 of the Act amended the federal overtime statute in order "* * * to bring [the federal overtime statute] into conformity with the policy of Title I of [the Contract Work Standards Act]." *Id.* at p. 12.

beginning of the Act, see 7 Fed. Reg. 4494, and has been consistently interpreted by the Department of Labor as requiring overtime compensation only for the greater of the total number of daily hours in excess of eight or the total number of weekly hours in excess of forty. See, *e.g.*, Rulings and Interpretations No. 3, §42(c) (January 31, 1961). Congress has never questioned either this interpretaton of the Walsh-Healy Act or the regulation cited by petitioners.

d. The Court of Claims correctly held that Extra Board employees were not engaged in work entitling them to overtime compensation. As the Court of Claims noted, the 1200 mile guarantee given Extra Board employees did not constitute payment for being on call, but merely was another arbitrary. Given that fact and the fact that Extra Board employees are free to do as they please while on Extra Board status, the Court of Claims correctly concluded that petitioners were not engaged to wait and that, therefore, the statute did not require overtime compensation.[5]

---

[5]This regulation, in relevant part, provides:

> * * * overtime shall be computed after 8 hours in any one day or after 40 hours in any one week *during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.* [Emphasis supplied.]

[6]The statute requires the payment of overtime compensation only to on-call employees required to remain within the confines of their post of duty. Petitioners do not contend that Extra Board employees are required to remain within the confines of their post of duty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.